IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0403

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN DAVID STRONG,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Prairie County, The Honorable Richard A. Simonton, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
JENNIFER A. HURLEY
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
JONATHAN M. KRAUSS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ALBERT R. BATTERMAN
Special Deputy Prairie
County Attorney
P.O. Box 564
Terry, MT 59349-0564

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

Appellant Shawn Strong (Strong) respectfully replies to the Appellee's Brief as follows:

I. THE DISTRICT COURT ERRED WHEN IT DENIED STRONG'S MOTION TO DISMISS FOR UNNECESSARY DELAY IN INITIAL APPEARANCE.

The State believes it can incarcerate a person without bringing him before a court to be informed of the charges against him and his right to counsel for a limitless period of time; so long as the State does not gather evidence against him, then it's "no harm, no foul." That is not the law in Montana, nor should it be.

"Unnecessarily delaying an initial appearance before a judge, where the duty of the court is to advise the defendant of his right to counsel[,] 'shocks the concept of fundamental fairness and due process.'" *State v. Gatlin*, 2009 MT 348, ¶ 22, 353 Mont. 163, 219 P.3d 874 (*quoting Fitzpatrick v. Crist*, 165 Mont. 382, 387, 528 P.2d 1322, 1325 (1974)). Under *Gatlin*, ¶ 23, where a defendant is not informed of his right to counsel at a prompt initial appearance, dismissal is an available and appropriate remedy. For no valid reason, Strong had no initial appearance for forty-two days; he was not informed of the charges against him or of his right to counsel during that time. The charges should have been dismissed without prejudice and the district court erred in denying his motion to dismiss. The State's contentions to the contrary fail.

A. A Defendant Is Not Required to Show Prejudice Before a Remedy Is Available.

The State contends that a defendant must show prejudice from the delay, aside from incarceration without being informed of the charges against him or his constitutional rights, before a violation of the initial appearance requirements can be remedied. (Appellee's Br. at 17-18.) As discussed in Appellant's Brief at 16-17, 21, under this Court's recent decision in *Gatlin*, ¶¶ 23-29, where a defendant files a motion to dismiss charges based on violations of the initial appearance requirements, prejudice caused by the violations is relevant to whether dismissal is with or without prejudice; it does not, as the State contends, determine whether there is any remedy at all. The State's contentions to the contrary are unavailing.

The State cites *State v. Rodriguez*, 192 Mont. 411, 628 P.2d 280 (1981), for the proposition that "only if the defendant" shows prejudice or a deliberate attempt by the prosecution to circumvent speedy arraignment will the court ever provide a remedy for a violation of the initial appearance requirements. (Appellee's Br. at 17.) That, however, is not the holding of *Rodriguez*.

Rodriguez did not make a motion to dismiss or a motion to suppress evidence based on an unnecessary delay in initial appearance; rather, he tried to attack his conviction on appeal based on various pretrial issues, including the delay in initial appearance. *See Rodriguez*, 192 Mont. at 413-14, 417-18, 628 P.2d at 281, 284. The Court did not determine as a matter of law that a defendant making

a *pretrial* motion on the grounds of a violation of the initial appearance requirements must always show prejudice in the form of evidence to be suppressed, or else there would be no remedy of any kind.

The State also cites an Idaho Court of Appeals case in support of the proposition that other jurisdictions "requir[e] prejudice from delay before making remedy available." (Appellee's Br. at 18 (*citing State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Idaho Ct. App. 1997).) But, *Reutzel* and the cases it cites involved a violation of the prompt preliminary hearing requirement at which probable cause is determined, not a delay in initial appearance at which a defendant is informed of the charges and his rights. To the extent the State invites the Court to analogize to cases involving delays in probable cause determination, Montana's jurisprudence actually supports Strong's position that dismissal is an available remedy, and that prejudice is not dispositive. In Montana, where a defendant suffers unreasonable delay in receiving a probable cause determination, dismissal may be granted. *State v. Robison*, 2003 MT 198, ¶ 15, 317 Mont. 19, 75 P.3d 301. Prejudice, which includes incarceration, is but one factor among many to determine the reasonableness of the delay in preliminary hearing; it is not determinative of whether there is any remedy available for unreasonable delay. *Robison*, ¶ 12.

The State concedes the delay in Strong's initial appearance was unnecessary. That violation of Strong's statutory rights should be remedied and, following

Gatlin, dismissal is an available remedy. Where the record does not support a finding of prejudice, the result is dismissal without prejudice--a modest remedy, but a remedy nonetheless.

B. Suppression of Evidence Is Not the Only Available Remedy.

The State next contends that, even where a defendant can show prejudice from a delay in initial appearance, the only remedy ever available is suppression of evidence. (Appellee's Br. at 19.) Thus, if the State didn't gather evidence during the delay, there is no remedy, even if the State otherwise benefitted from the delay (e.g., lost defense witnesses) and even if the defendant sat in jail without bail being set or being informed of the charges against him or his right to counsel for months or even years.

The State cites three cases for the proposition that suppression of evidence is the only remedy ever available for an unnecessary delay in initial appearance: *State v. Brown*, 1999 MT 339, 297 Mont. 427, 993 P.2d 672; *State v. Dieziger*, 200 Mont. 267, 650 P.2d 800 (1982); and *State v. Benbo*, 174 Mont. 252, 570 P.2d 894 (1977).

Benbo, 174 Mont. at 254, 570 P.2d at 896, dealt only with a motion to suppress; the defendant did not file a motion to dismiss. Whether dismissal is an available remedy simply was not before the Court. In *Dieziger*, 200 Mont. at 269-70, 650 P.2d at 802, there was no violation of the defendant's right to an initial

appearance after arrest without unnecessary delay; the defendant was not arrested, because he was already incarcerated, and he received his initial appearance on the same day the charges were filed. He also suffered no prejudice, in light of the fact that he was already incarcerated on other charges and there was no possibility of unjust incarceration during the delay. *Dieziger*, 200 Mont. at 270, 650 P.2d at 802. The Court's further statement that "dismissal is an inappropriate remedy" was *dicta*. Moreover, its related statement that "the proper remedy for a violation of section 46-7-101 is suppression of improperly obtained evidence" was supported by a "*See*" citation to *Benbo*, which, as discussed, dealt only with a motion to suppress and did not hold that suppression is the only available remedy. *Dieziger*, 200 Mont. at 270, 650 P.2d at 802. While in *Brown* this Court cited *Dieziger* for the proposition that dismissal of charges is not an appropriate remedy, *Brown* actually dealt with a delay in probable cause determination. In any event, since *Brown* this Court has held that dismissal is an available remedy for unreasonable delays in probable cause determination. *Robison*, ¶ 15.

This Court's recent decision in *Gatlin* makes it clear that dismissal is an available remedy for violations of the initial appearance requirement--at least where that violation deprives a defendant of his right to be informed of his right to counsel, as was the case here. The State tries to distinguish *Gatlin* on the basis that

> [t]he issue in Gatlin was not, as here, whether there was unnecessary delay between arrest and initial appearance pursuant to Mont. Code

> Ann. § 46-7-101. The issue in Gatlin, was whether the appropriate remedy for failure to inform Gatlin of his right to counsel at the initial appearance in violation of Mont. Code Ann. §§ 46-7-102 and 46-8-101, was vacation of his conviction and dismissal of the charges, and ultimately whether dismissal should be with or without prejudice.

(Appellee's Br. at 20.)

This is a distinction without a difference. The thrust of the State's position is that where, as in *Gatlin*, a defendant has a prompt initial appearance at which he is informed of the charges against him but the appearance is defective because he is not informed of his right to counsel, then dismissal is an available remedy. However, where, as here, a defendant has no initial appearance for an unnecessarily long time, sits in jail not having been informed of the charges against him or of his right to counsel or of anything else required at the initial appearance, then there's no remedy to be had. In other words, if the State violates only some of a defendant's initial appearance rights, then dismissal is appropriate; if the State violates all of a defendant's initial appearance rights, then there is no remedy (unless the State gathered evidence during that time). Contrary to the State's contention, it is not only "logical" but equitable to apply *Gatlin* to the instant case and hold that dismissal without prejudice is an available remedy for the unnecessary delay Strong suffered in receiving his initial appearance and thus in being informed of the charges against him and his rights.

To the extent the State contends that Strong's claim must fail because "[t]here was no unreasonable delay of the appointment of counsel" and that Strong's right to counsel "is not at issue here," the contention fails on the facts. (Appellee's Br. at 21.) Strong sat in jail for forty-two days without being informed of the right to counsel or having counsel appointed by the court. The local OPD office noticed that Strong was sitting in jail, without an initial appearance. Finally, *more than one month* after he was arrested and incarcerated, OPD stepped in and entered a notice of appearance--on its own initiative and without a court order. (D.C. Doc. 5.) Strong is fortunate that OPD realized that he was sitting in jail and decided to "appoint" itself, although it had no actual authority to do so without a court order. *See* Mont. Code Ann. §§ 46-8-101(2), 47-1-104(3)-(4). The next defendant incarcerated and left for weeks on end with no initial appearance might not be so lucky.

Moreover, Strong's right to counsel is at issue here. His argument for dismissal on the basis of the delay in initial appearance is inextricably intertwined with the issue of the lack of counsel; a defendant is informed of the right to counsel and can exercise that right at the initial appearance. Mont. Code Ann. § 46-7-102. Deprivation of an initial appearance *is* deprivation of the right to counsel.

Strong sat in jail for forty-two days without an initial appearance, without being informed of the charges against him or of his right to counsel or having bail

set, for no valid reason. Strong was entitled to the modest remedy of dismissal without prejudice. *Gatlin*, ¶¶ 23, 27. The district court erred when it denied Strong's motion to dismiss.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED STRONG'S MOTION FOR A MISTRIAL AFTER THE STATE ELICITED INFLAMMATORY AND PREJUDICIAL TESTIMONY FROM K.S.'S MOTHER THAT STRONG HAD BEEN VIOLENT TOWARD HER IN THE PAST.

The State contends that "[w]hen Strong chose to attack Finneman's credibility for not telling the truth to police, he opened the door to *any* explanation of why she lied . . . ." (Appellee's Br. at 28 (emphasis added).) In other words, once Strong opened the door to Finneman's credibility by eliciting evidence of the change in her story, there was no limit to how far the door was opened; no matter how prejudicial the evidence or how much its relevance was outweighed by its prejudicial impact, the evidence was admissible. But, that is not the law.

The State relies on *Cline v. Durden*, 246 Mont. 154, 161, 803 P.2d 1077, 1081 (1990), for the proposition that "[b]y inquiring into new matters on cross-examination, counsel 'effectively over[comes] his own objection to matters contained therein and open[s] the door for further inquiry on redirect,'" and that by attacking Finneman's credibility he opened the door to "any" explanation of why she lied; in so doing, "Strong effectively overcame his objection to what might come through the door." (Appellee's Br. at 23 (*quoting Cline*, 246 Mont. at 161,

803 P.2d at 1081).) *Cline*, however, does not stand for the proposition that a defendant who impeaches a witness's credibility opens the door to any and all evidence to explain a lie, no matter the prejudicial impact of that evidence. *Cline* simply did not deal with the issues here. Rather, *Cline* dealt with the applicability of the "completeness" rule, Montana Rule of Evidence 106, which provides that where a party introduces part of a document, conversation, act, etc., an adverse party is entitled to inquire into or introduce other parts of that item where those parts are relevant to what was already admitted. *Cline*, 246 Mont. at 161, 803 P.2d at 1081; *State v. Campbell*, 178 Mont. 15, 19, 582 P.2d 783, 785 (1978). Thus, where the plaintiff asked a witness about portions of his accident report, the plaintiff "effectively overcame his own objection to matters contained" in the report because under the completeness rule the defendant was entitled to ask about other portions of the report on redirect. *Cline*, 246 Mont. at 161, 803 P.2d at 1081.

This Court has never held that when a defendant opens the door to credibility evidence, he opens the door to any and all evidence, notwithstanding other applicable rules of evidence or a defendant's right to a fair trial. Quite the opposite: in the cases cited by the State (*see* Appellee's Br. at 23-24) it is clear the defendant still has a right to a fair trial and the district court protects that right by limiting prejudicial evidence and/or by giving cautionary instructions. Thus, in *State v. Berger*, 1998 MT 170, ¶ 43, 290 Mont. 78, 964 P.2d 725, while the State

could ask a witness about the defendant's threats and assaults against her to explain why she moved, the district court "properly admonished the jury prior to re-direct that [the witness's] testimony should be received only to help explain her testimony on cross-examination and not to show [the defendant's] character." While the defendant in *Cissel v. Western Plumbing & Heating*, 188 Mont. 149, 612 P.2d 206 (1980), was entitled to ask a witness about the plaintiff's threats to show a motive to testify falsely, the district court "should have instructed the jury that the evidence of the assault and threat should only be considered as it pertained to [the witness's] credibility." *Cissel*, 188 Mont. at 158, 612 P.2d at 211 (holding that it would not disturb the judgment based on a failure to give a limiting instruction where the party did not request it). In *State v. Board*, 135 Mont. 139, 146, 337 P.2d 924, 928 (1959), "the lower court was most diligent to keep the redirect in bounds." And in *State v. Veis*, 1998 MT 162, ¶ 19, 289 Mont. 450, 962 P.3d 1153, the "testimony regarding other acts was very limited and was not unfairly prejudicial."

Here, however, the district court did not protect Strong's right to a fair trial, by limiting redirect to what was necessary to explain Finneman's change in her story, instead inviting unnecessary and inflammatory testimony about prior violence. (Appellant's Br. at 26.) Finneman had already explained why she changed her story, because she was afraid of Strong; the district court abused its

discretion when it then allowed State to ask her why she was afraid of Strong. Strong did not contest that Finneman was afraid of him. (Tr. at 200-01.) Her further testimony that Strong was violent towards her in the past was unnecessary and inflammatory.

Moreover, the district court failed to protect Strong's right to a fair trial when it ruled, twice, that it would not give a limiting instruction and in so doing failed to limit the jury's consideration of the evidence to permissible purposes. To the extent the State contends Strong's claim must fail because he did not request a limiting instruction among the instructions to the jury, the notion is divorced from reality. The district court already ruled, twice, that it would not give such an instruction, including after the State said it would not object to one. (Tr. at 252.)

Next, the State contends the district court did not abuse its discretion when it denied the motion for a mistrial. Contrary to the State's contention, the evidence of Strong's guilt was not "overwhelming." (Appellee's Br. at 29.) While circumstantial evidence can be sufficient to obtain a conviction, the circumstantial evidence here was far from "overwhelming." The only evidence linking Strong to K.S.'s injuries was Finneman's testimony that K.S. was fine when she left him with Strong, and her credibility was questionable given her personal interest in deflecting potential blame from her and evidence that she changed testimony from what she told police. (Appellant's Br. at 28-29.) This is not "strong" evidence

under the factors set forth in *State v. Partin*, 287 Mont. 12, 18, 961 P.2d 1002, 1005 (1997).

The State further contends the "context" of Finneman's statement that Strong had been violent toward her in the past lessened its prejudicial impact, because it was made on redirect in response to impeachment and not during direct examination as proof of material elements of the crime. (Appellee Br. at 31.) The State fails to explain why such a distinction would made any difference to a jury. The jury heard sworn testimony that Strong had been violent towards another intimate family member, from that alleged victim; whether the testimony was elicited on direct or redirect, the danger still exists that, having heard the testimony, the jury could determine that Strong was a violent person with a propensity toward hurting his family members, and thus was more likely to have committed the crime at issue. *See State v. Derbyshire*, 2009 MT 27, ¶ 22, 349 Mont. 114, 201 P.3d 811.

Further, the cases the State cites for its contention that Finneman's statement was no more prejudicial than other cases in which this Court had affirmed a denial of a motion for mistrial are readily distinguishable. (Appellee's Br. at 24.) In *State v. Dubois*, 2006 MT 89, ¶ 51, 332 Mont. 44, 134 P.3d 82, a witness testified that the defendant was "like a gangster." "Gangster" is a vague term that "leave[s] the listener guessing as to the actions or characteristics of the person being

described," relies upon innuendo, and "convey[s] only a vague message that someone is a 'bad person'. . . ." *Anderson v. City of Troy*, 2003 MT 128, ¶ 7, 316 Mont. 39, 68 P.3d 805 (quoting and agreeing with district court's analysis). In contrast, there was nothing vague about Finneman's testimony that Strong had been violent toward her. In *State v. Weldele*, 2003 MT 117, ¶ 76, 313 Mont. 452, 69 P.3d 1162, the witness's statements merely "impl[ied] that a previous altercation occurred" between the defendant and her; she did not come out and say the defendant had been violent toward her. Moreover, the district court instructed the jury that there had been no prior allegations of domestic abuse, and the jury ultimately acquitted the defendant on the partner assault count. *Weldele*, ¶ 76. Finally, in *State v. Scarborough*, 2000 MT 301, ¶¶ 83-84, 302 Mont. 350, 14 P.3d 1201, a witness inadvertently mentioned that the defendant was on probation, but was no more specific than that; the evidence was overwhelming where there were multiple eyewitnesses and the defendant admitted the killing; and the defense was based not on commission of the murder but on issues of mental state and mitigating circumstances.

The district court abused its discretion when it denied Strong's motion for a mistrial.

III. THE RESTITUTION PROVISION WAS ILLEGAL.

A. Blue Cross Was Not a Victim.

Contrary to the State's assertion, this Court should not decline to review Strong's claim that the district court lacked statutory authority to impose restitution to Blue Cross. The State contends the Court should not review the issue because Strong did not sufficiently raise it below. (Appellee's Br. at 35-36.) Before the district court Strong's counsel clearly argued that the condition requiring restitution to Blue Cross should be stricken because "[t]hey are not a victim." (Tr. at 382.) Although counsel did not cite Mont. Code Ann. § 46-18-243(2)(a)(iv), the definition of victim applicable to insurance companies, he clearly was arguing that Blue Cross was not a victim as defined by statute. And the district court clearly understood that to be his argument and rejected it on the merits. (Tr. at 397 (imposing restitution and stating: "They were out that sum simply because of an insurance contract. I look at them as a victim.").)

This Court does not require magic words to sufficiently raise an issue before the district court, so long as it is adequately presented for the district court to rule on it. *E.g.*, *State v. Butler*, 272 Mont. 286, 290-91, 900 P.2d 908, 910-11 (1995) (holding defendant had sufficiently raised self-incrimination issue where he expressed concerns over having to admit guilt before undergoing sexual offender treatment, but did not cite the Fifth Amendment or cases). As in *Butler*, 272 Mont.

at 290, 900 P.2d at 911 whether Blue Cross met the statutory definition of victim was presented to the court and "central to" Strong's discussion with the court of that restitution provision. The reason for the rule requiring a defendant to have raised an issue before the district court is that "a District Court will not be put in error where it was not accorded an opportunity to correct itself." *State v. Patton*, 183 Mont. 417, 422, 600 P.2d 194, 197 (1979). Here, the district court was presented with the argument that Blue Cross did not meet the statutory definition of victim; the court understood that was the issue before it; the court was given the opportunity to correct itself; and the court rejected the argument, erroneously.

Even assuming Strong did not sufficiently raise the issue below, he can raise it now because the restitution condition is illegal, because the district court had no authority to award restitution to a nonvictim and the State did not establish that Blue Cross met the statutory definition of victim. (Appellant's Br. at 24-25.) The State contends the Court should decline to review this issue just as it did in *State v. O'Connor*, 2009 MT 222, 351 Mont. 329, 212 P.3d 276. (Appellee's Br. at 34.) In *O'Connor*, the Court did not hold that a condition requiring restitution to an insurer in the absence of any evidence it met the statutory definition of victim did not render a restitution provision illegal. Unlike here, the *Micklon* exception applied. O'Connor "participated or actively acquiesced in the imposition of a condition of [her] sentence, *State v. Micklon*, 2003 MT 45, 314 Mont. 291, 65 P.3d 559," where

she agreed to pay restitution in the plea agreement, told the probation officer she had to pay restitution, and did not object to payment of restitution at the hearing. *O'Connor*, ¶¶ 11, 13.

The district court had authority to impose restitution only to "an insurer or surety with a right of subrogation." Mont. Code Ann. § 46-18-243(2)(a)(iv). On the merits, the State contends "it is a reasonable implied finding of fact that Blue Cross Blue Shield paid the medical expenses under a typical insurance contract containing a right of subrogation." (Appellee's Br. at 37.) Under the doctrine of implied findings, "where a court's findings are general in terms, any findings not specifically made, but necessary to the judgment, are deemed to have been implied, *if supported by the evidence*." *State v. Wright*, 2001 MT 282, ¶ 9, 307 Mont. 349, 42 P.3d 753 (emphasis added). Here, there was no evidence that Blue Cross had a right of subrogation. Nor would such a finding have been "necessary to the judgment," since the district court erroneously determined that Blue Cross was a victim merely by virtue of having paid the medical expenses pursuant to a contract. The State essentially asks this Court to assume Blue Cross had a right of subrogation, but to make such an assumption would read out of the statute the express requirement that the insurer have a right of subrogation before a district court is authorized to impose restitution.

Finally, contrary to the State's assertion, there is no plausible justification for counsel's failure to adequately argue this issue, assuming he did not do so. The State's assertions that Strong fails to establish below or argue on appeal that Blue Cross did not have a subrogation right is a red herring. (Appellee's Br. at 38.) The State bears the burden to establish restitution. *See State v. Beavers*, 2000 MT 145, ¶ 12, 300 Mont. 49, 3 P.3d 614 (State bears the burden of establishing values for restitution) (overruled on other grounds). It was not Strong's burden to disprove that Blue Cross had a subrogation right.

Counsel's strategy was to object to restitution for Blue Cross on the basis that Blue Cross was not a victim as a statutory matter. He should have made the proper argument that the State failed to adduce any evidence that Blue Cross met the statutory definition. The State speculates that counsel knew Blue Cross had a right of subrogation. (Appellee's Br. at 38-39.) Even if that were true, there is no reason not to put the State to its burden to prove Blue Cross met the statutory definition of victim. Given that the State had adduced no evidence of this fact at the hearing, counsel had "nothing to lose," *State v. Rose*, 1998 MT 342, ¶ 18, 292 Mont. 350, 972 P.2d 321, by arguing the fact that there was no evidence at the hearing of a subrogation right to establish that Blue Cross was a victim under Mont. Code Ann. § 46-18-243(2)(a)(iv). Once counsel decided to object to

restitution to Blue Cross, it was incumbent upon him to make the proper and full statutory argument.

B. There Was No Victim Affidavit.

The PSI did not include an affidavit from Blue Cross describing its losses as required by Mont. Code Ann. § 46-18-242. The State contends this Court should not address this issue because Strong raises it for the first time on appeal. (Appellee's Br. at 40.) The State cites *State v. Schmidt*, 2009 MT 450, 354 Mont. 280, 224 P.3d 618. *Schmidt* is distinguishable. There, the victims submitted a written statement, although it was not an affidavit; Schmidt admitted that restitution was appropriate; and Schmidt initially supported restitution in exchange for suspension of the weapons enhancement sentence. *Schmidt*, ¶¶ 73-75. In contrast, Strong did not agree to restitution or seek a benefit in exchange, nor was there any evidence here from the victim as to its loss.

The Court in *Schmidt* did not expressly state that the district court's failure to comply with the statutory victim affidavit requirement renders a restitution provision merely objectionable, not illegal. Nor should it; a district court has no authority to impose restitution until its meets the statutory requirements of Mont. Code Ann. §§ 46-18-241 through -249. *State v. Pritchett*, 2000 MT 261, ¶ 7, 302 Mont. 1, 11 P.3d 539. If, however, this Court interprets its decision in *Schmidt* as having held that a district court's failure to follow the statutory affidavit

requirement renders a restitution condition objectionable but not illegal, then Strong concedes he cannot raise this issue for the first time on appeal.

However, that only highlights the ineffective assistance counsel rendered by failing to object to the lack of affidavit before the district court. The State contends counsel was not ineffective and had a plausible justification for failing to object to the lack of affidavit because "Strong had effectively stipulated to the pecuniary loss at issue." (Appellee's Br. at 40.) However, Strong asserts that counsel was ineffective for conceding the amount Blue Cross had paid, for failing to argue the court could not impose restitution in the absence of a victim affidavit, and for failing to argue the court could not impose restitution in the absence of any evidence in the record supporting the award. (Appellant's Br. at 38.)

The PSI had no victim affidavit, there was no victim testimony at the sentencing hearing, nor was there any other evidence of the amount paid. (Appellant's Br. at 10-11.) Given that, counsel should have put the State to its burden to establish the amount of restitution due, rather than simply concede the amount. There is no plausible justification for this. Once counsel decided to object to restitution, he abandoned a tactic of currying favor. There was no downside to requiring the State to attempt to prove the restitution amount, require the district court to follow the statutory requirements, and ensure the restitution award was supported by evidence in the record.

Moreover, the statement by Strong's counsel that he did not contest the amount Blue Cross paid (Tr. at 382) is not the kind of substitute for an affidavit that this Court has found acceptable. In *State v. Coluccio*, 2009 MT 273, 352 Mont. 122, 214 P.3d 1282, the victim did not submit an affidavit, but the victim did submit a restitution list about which she testified, under oath, at the sentencing hearing. There simply was no evidence from the victim, Blue Cross, of its loss. Once counsel decided to contest restitution, he should have raised these issues. The district court would have realized it could not impose restitution in the absence of a victim affidavit or sworn testimony supporting restitution. Mont. Code Ann. § 46-18-243(1)(a) (pecuniary loss must be substantiated by evidence in the record). Strong was prejudiced by counsel's failure.

CONCLUSION

The Court should vacate Strong's conviction with instructions to dismiss the Information without prejudice. In the alternative, the Court should vacate his conviction and remand for a new trial. If not, the Court should strike the restitution condition or in the alternative remand for further proceedings.

Respectfully submitted this _____ day of March, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

`

By: _____
JENNIFER A. HURLEY
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
JONATHAN M. KRAUSS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ALBERT R. BATTERMAN
Special Deputy Prairie County Attorney
P.O. Box 564
Terry, MT 59349-0564

SHAWN DAVID STRONG 2106818
Crossroads Correctional Center
50 Crossroads Drive
Shelby, MT 59474

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,994 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JENNIFER A. HURLEY